

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
February 8, 2008 Session

WILLIAM EDWARD WYNNS, JR. v. SHERRIE BLACKBURN WYNNS

**Appeal from the Circuit Court for Wilson County
No. 5183DV Clara Byrd, Judge**

No. M2007-00740-COA-R3-CV - Filed September 26, 2008

This appeal concerns the spousal support awarded Wife in a divorce action. Both Husband and Wife sought a divorce in the Circuit Court for Wilson County. Following a bench trial, the court granted Wife an absolute divorce based on Husband's adultery and divided the marital assets equally between the parties. The court awarded Wife alimony in the form of attorney's fees and insurance premiums for the first year post-divorce followed by alimony of \$500 per month for four years. The court did not classify the alimony as either rehabilitative, transitional, *in solido*, or permanent. Wife appeals seeking increased support or, in the alternative, a redistribution of marital property. We have determined that Wife's spousal support should be increased based on the disparity between the parties' economic status.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed as
Modified, Remanded**

ANDY D. BENNETT, J., delivered the opinion of the court, in which RICHARD H. DINKINS, J., joined. PATRICIA J. COTTRELL, P.J., M.S., not participating.

Mark Wesley Henderson, Lebanon, Tennessee, for the appellant, Sherrie Blackburn Wynns.

James H. Flood, Lebanon, Tennessee, for the appellee, William Edward Wynns, Jr.

OPINION

THE CASE BELOW

William Edward Wynns, Jr. and Sherrie Blackburn Wynns were married in October 1988. There were no children born of the marriage. Mr. Wynns filed for divorce on September 15, 2005, citing irreconcilable differences. Mrs. Wynns answered and filed a counter-complaint admitting irreconcilable differences and alleging that Mr. Wynns was guilty of inappropriate marital conduct and adultery. Trial was held on March 1, 2007. By order dated March 7, 2007, the trial court granted Wife an absolute divorce based on Husband's adultery and awarded her alimony in the amount of \$500 per month for four years beginning one year after entry of the divorce decree. As

additional alimony, Husband was required to pay Wife's attorney's fees in the amount of \$11,321.45 and Wife's COBRA insurance coverage for the first 12 months post-divorce. The retirement accounts of both Husband and Wife were divided with Wife receiving 50% of the amounts accrued during the 18 years and 6 months of marriage. The Wynnses' 2005 federal tax refund in the amount of \$7,249.27 was divided equally. Wife also obtained a judgment against Husband in the amount of \$1,470.00 for past alimony accrued during a lapse in court-ordered support.¹ The trial court made limited findings of fact in its order. Wife takes issue with the court's failure to classify the type of alimony arguing the facts and circumstances warrant an increased award and longer duration.

BACKGROUND

For the first 12 to 13 years, the Wynnses had a good marriage and enjoyed a comfortable lifestyle. Lieutenant Colonel Wynns ("Husband") was in the United States military reserves and worked full-time as a federal civilian employee. He was the primary breadwinner and earned a gross annual salary of \$95,818.20 in 2006. At the time of trial, Husband's year-to-date 2007 earnings were \$19,227.48, reflecting a gross annual salary of well over \$100,000.00.² Mrs. Wynns ("Wife") worked full-time during the marriage as a licensed optician, at one time making \$35,000 a year when employed as a manager. Prior to the dissolution of the marriage, Wife was laid off and began working at LensCrafters for \$15.99 an hour with no supervisory duties. She started cleaning houses one day a week to supplement her income. At the time of trial, Wife worked at LensCrafters two days a week and cleaned houses three days a week. The couple maintained separate checking accounts and both contributed to daily living expenses. During the marriage Husband accumulated substantial retirement accounts totaling approximately \$249,000.00; Wife's retirement accounts totaled approximately \$25,000.00.

The majority of the proof presented at trial centered on the relative fault of the parties. Unbeknownst to Husband, Wife incurred a significant amount of credit card debt sometime between 1995 and 1998. In 1998, the Wynnses bought a Lexus and obtained a second mortgage on their home to finance the vehicle. The Wynnses were approved for a \$55,000 line of credit, in excess of what was needed for the car. Wife deposited the extra \$17,000 from their line of credit into her account and did not tell Husband. At trial, Wife testified that the money was used to help care for her ailing father before he died in 1998, to help her sister and nephews with necessities, and to pay for other minor expenses; she was unable to account for the full amount. As pertaining to the issue of debt, the trial court found Husband to be credible. Husband attributes the breakdown of the marriage to the financial strain cause by Wife's debts. The marital home was located in the

¹On August 22, 2006, Husband was ordered to pay *pendente lite* support to Wife in the amount of \$982 per month until September 13-14, 2006, the dates originally set for trial. The trial was continued until March 2007, however, Husband stopped paying support in September as per the original order. *Pendente lite* support was reinstated by agreed order beginning November 30, 2006 but the parties disagreed on whether Husband owed support for September - October.

²There is some dispute between the parties as to Husband's annual income, however, Husband conceded at oral argument that he earns over \$100,000.00 annually.

Richmond Hills community in Lebanon, Tennessee, and contained approximately 3,257 square feet. The house sold for \$320,000 and the Wynnses used the money to pay off the marital debts and divided the remaining proceeds equally.

Husband admits to having an extramarital affair with a coworker named Diana Moore. Wife had suspicions that Husband and Ms. Moore were having an affair in 2001, but Husband denied the affair when confronted. Husband maintains his sexual relationship with Ms. Moore did not begin until the end of 2004. Husband used marital funds to purchase a number of substantial gifts for Ms. Moore beginning as early as 2002, including jewelry, electronics, and gifts for her son. Husband went on several trips out of state with Ms. Moore, sometimes with her son, without Wife's knowledge.³ In 2005, Ms. Moore became pregnant with Mr. Wynns' child, a boy born in April 2006.

Wife appeals the amount of the trial court's award of spousal support and distribution of marital property and seeks attorney's fees on appeal.⁴ Husband seeks attorney's fees, costs, and damages for frivolous appeal.

ANALYSIS

Spousal Support

We first address Wife's issue with the amount and duration of spousal support. The court awarded Wife alimony in the form of attorney's fees of \$11,321.45, Husband's payment of COBRA insurance for Wife for one year, and \$500.00 per month for four years thereafter. Wife argues that the amount of spousal support awarded was too low because the trial court failed to consider the relevant statutory factors in Tenn. Code Ann. § 36-5-121(i).⁵ We agree.

Trial courts have broad discretion to determine whether spousal support is needed and, if so, the appropriate type of alimony, amount, and duration. *Bratton v. Bratton*, 136 S.W.3d 595, 605 (Tenn. 2004). An award of spousal support will not be disturbed on appeal absent an abuse of the trial court's discretion. *Broadbent v. Broadbent*, 211 S.W.3d 216, 220 (Tenn. 2006). Therefore, "[a]ppellate courts are generally disinclined to second-guess a trial judge's spousal support decision

³The earliest trip was taken in March 2004.

⁴Husband argues that Wife failed to properly object to or raise the issues now on appeal before the trial court and should be prevented from raising them before this court. This argument is without merit. Neither Rule 52 nor Rule 59.02 of the Tennessee Rules of Civil Procedure require Wife to file a motion for findings or a motion for new trial before filing this appeal as Husband contends. Wife's failure to object to the court's order "at the conclusion of the proceedings" likewise does not prevent her from appealing the judgment of the trial court.

⁵Wife also argues the trial court erred in failing to designate the type of alimony awarded. The governing statutes do not expressly require the court to designate or classify the type of alimony it awards. A trial court should, however, designate the type of alimony for purposes of clarity and future reference. The relevant inquiry is whether the court properly applied the principles found in Tenn. Code Ann. § 36-5-101, *et seq.*, to the facts and circumstances of the case.

unless it is not supported by the evidence or is contrary to the public policies reflected in the applicable statutes.” *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001) (quoting *Kinard v. Kinard*, 986 S.W.2d 220, 234 (Tenn. Ct. App. 1998)). Our review of the court’s findings of fact is de novo upon the record accompanied by a presumption of correctness. Tenn. R. App. P. 13(d); *Crabtree v. Crabtree*, 16 S.W.3d 356, 360 (Tenn. 2000).

In awarding spousal support, the trial court must consider the statutory factors enumerated in Tennessee Code Annotated section 36-5-121(i). The single most important consideration for the court is the need of the disadvantaged spouse seeking support followed next by a consideration of the ability of the economically advantaged spouse to pay support. *Oakes v. Oakes*, 235 S.W.3d 152, 160 (Tenn. Ct. App. 2007). Tennessee courts may award the following classes of spousal support: rehabilitative alimony; alimony *in futuro*, also known as periodic alimony; transitional alimony; or alimony *in solido*, also known as lump sum alimony; or a combination of these. Tenn. Code Ann. § 36-5-121(d)(1). Alimony is intended “to aid the disadvantaged spouse to become and remain self-sufficient and, when economic rehabilitation is not feasible, to mitigate the harsh economic realities of divorce.” *Owens v. Owens*, 241 S.W.3d 478, 493-94 (Tenn. Ct. App. 2007) (citing *Earls v. Earls*, 42 S.W.3d 877, 888 (Tenn. Ct. App. 2000)).

Rehabilitative alimony is intended to assist the economically disadvantaged spouse “to achieve, with reasonable effort, an earning capacity that will permit [her] standard of living after the divorce to be reasonably comparable to the standard of living enjoyed during the marriage. . . .” Tenn. Code Ann. § 36-5-121(e)(1). The statute expresses a preference for awarding the economically disadvantaged spouse rehabilitative alimony over long-term alimony *in futuro* and provides:

To be rehabilitated means to achieve, with reasonable effort, an earning capacity that will permit the economically disadvantaged spouse’s standard of living after the divorce to be reasonably comparable to the standard of living enjoyed during the marriage, or to the post-divorce standard of living expected to be available to the other spouse, considering the relevant statutory factors and the equities between the parties.

Tenn. Code Ann. § 36-5-121(d)(2). Transitional alimony is typically awarded when rehabilitation of the disadvantage spouse is not necessary, but the court finds “the economically disadvantaged spouse needs assistance to adjust to the economic consequences of a divorce. . . .” Tenn. Code Ann. § 36-5-121(d)(4). Transitional alimony is nonmodifiable except in certain circumstances that do not apply in this case. Tenn. Code Ann. § 36-5-121(g)(2). Alimony *in solido*, another form of long-term support, is an award of a sum-certain that may be paid in installments so long as it is payable over a definite period of time. Tenn. Code Ann. § 36-5-121(h)(1).

Tenn. Code Ann. § 36-5-121(i) gives a list of twelve factors to be considered by a court in determining whether alimony is appropriate and in determining the nature, amount, length of term, and manner of payment of the alimony. As we have already noted, the two most important factors

are the disadvantaged spouse's need and the advantaged spouse's ability to pay. *Bratton*, 136 S.W.3d at 604. The disadvantaged spouse's need serves as the threshold consideration. *Owens*, 241 S.W.3d at 494. The court is to consider all relevant factors including:

- (1) The relative earning capacity, obligations, needs, and financial resources of each party, including income from pension, profit sharing or retirement plans and all other sources;
- (2) The relative education and training of each party, the ability and opportunity of each party to secure such education and training, and the necessity of a party to secure further education and training to improve such party's earnings capacity to a reasonable level;
- (3) The duration of the marriage;
- (4) The age and mental condition of each party;
- (5) The physical condition of each party, including, but not limited to, physical disability or incapacity due to a chronic debilitating disease;
- (6) The extent to which it would be undesirable for a party to seek employment outside the home, because such party will be custodian of a minor child of the marriage;
- (7) The separate assets of each party, both real and personal, tangible and intangible;
- (8) The provisions made with regard to the marital property, as defined in § 36-4-121;
- (9) The standard of living of the parties established during the marriage;
- (10) The extent to which each party has made such tangible and intangible contributions to the marriage as monetary and homemaker contributions, and tangible and intangible contributions by a party to the education, training or increased earning power of the other party;
- (11) The relative fault of the parties, in cases where the court, in its discretion, deems it appropriate to do so; and

(12) Such other factors, including the tax consequences to each party, as are necessary to consider the equities between the parties.

Tenn. Code Ann. § 36-5-121(i)(1)-(12).

Husband was 42 years old and Wife was 44 years old at the time of trial. Husband had earned a college degree and was an officer in the military with an income of over \$100,000 a year. As found by the trial court, Husband clearly had the ability to pay alimony. Wife had a high school education but no post-secondary education. At one time, Wife earned approximately \$35,000 annually working as a licensed optician in management and earning commissions. She continued to work two days a week at Lenscrafters, Inc. earning approximately \$15.99/hour and to clean houses three days a week. Her income and expense statement reflected a net income of \$1,951.75 per month, and the court set Wife's expenses at \$1,980.77 per month.⁶ Clearly, Wife was the economically disadvantaged spouse as the income disparity between Husband and Wife was substantial.

This was a lengthy marriage of more than 18 years. The Wynnses enjoyed a moderately high standard of living during the marriage. They were members of Five Oaks Golf & Country Club, had a spacious home in an affluent neighborhood, and owned numerous trucks and luxury vehicles throughout the marriage. At the time of trial, Wife was renting a small apartment in a duplex. As of the date of trial, Ms. Moore was building a home approximately 4,500 square feet in size. Husband was to live with Ms. Moore rent-free. The Wynns had no children and no apparent separate assets; the majority of the marital property was divided equally between Husband and Wife either before trial or by the court. Both parties made significant contributions to the marriage. The trial court found Husband made more tangible contributions to the marriage through his frugality and savings. Wife made intangible contributions such as housekeeping, cooking, and cleaning and did contribute financially.

The trial court referenced the parties' fault numerous times in making its ruling and, therefore, considered it a relevant factor. Upon review of the record and the relatively minimal amount of assets for division, we believe Wife's need, Husband's ability to pay, and Husband's fault require this court to alter the trial court's alimony award. Husband's behavior incident to the affair and after the separation, particularly the threats of suicide and false assertions about his job security, is an aggravating factor in considering Wife's mental and physical condition. Wife suffered serious emotional problems as a result of the divorce. She took prescription medication for depression and was in counseling through her church. While there was no evidence that either party was physically incapable of working, there was evidence that Wife's emotional state made her anxious around

⁶Wife initially listed expenses in excess of \$3,500. The court, however, determined some expenses were unnecessary, such as rental fees for three storage units, and eliminated others in its judgment against Husband, such as payments allotted for attorney's fees.

people and likely prevented her from resuming any kind of managerial position. Wife was also being monitored for diabetes. As a result of the divorce, Wife lost her share of military benefits, namely health insurance, and is now responsible for these costs. Husband is in good health.

The trial judge did not classify the type of alimony it awarded Wife but stated, “I do believe [Wife] needs some long term assistance. . . because she’s going to still have to have insurance. She would have been entitled to it if they remained married. That’s an expense she wouldn’t have had. I think she can basically pay her other expenses.” No evidence was presented at trial regarding a plan for Wife’s rehabilitation. Wife had no plans to further her education or to pursue a new career. Based on the record, we disagree with the trial court as to the duration and amount of the alimony awarded Wife. We have concluded that the support awarded was alimony *in solido* because it was a lump-sum award payable in installments of \$500 per month for four years without any contingencies that would cause the alimony to terminate. Based on the evidence in the record, we conclude that the trial court’s award was in error. We therefore modify the trial court’s order to award Wife alimony *in solido* in the amount of \$1,200.00 per month for a term of five (5) years. The order of the trial court is modified retroactive to the date of the initial order.

Marital Property Distribution

In light of the fact that we have modified the award of support for Wife, we find no abuse of discretion in the court’s marital property division. *See Owens*, 241 S.W.3d at 490 (trial court’s discretion in equitable division of marital property accorded great weight on appeal). The judgment of the trial court is affirmed.

Attorney’s Fees, Costs, and Frivolous Appeal

Lastly, Wife seeks an award of attorney’s fees in prosecuting the appeal. The award of attorney’s fees in actions for divorce is treated as an award of alimony *in solido* pursuant to Tenn. Code Ann. § 36-5-121(h)(1). The trial court awarded Wife this form of alimony in ordering Husband to pay her attorney’s fees in the amount of \$11,321.45. Because this court has increased the amount of her monthly alimony award, Wife’s request for attorney’s fees on appeal is denied.

We also deny Husband’s request for damages, attorney’s fees, and costs for frivolous appeal. An appeal is considered frivolous when it has no reasonable chance of success or is so devoid of merit that imposing a penalty is justified. *Whalum v. Marshall*, 224 S.W.3d 169, 181 (Tenn. Ct. App. 2006). Because the record supports Wife’s need for additional alimony and Wife prevailed in her appeal, an award for a frivolous appeal is not justified.

CONCLUSION

The judgment of the trial court is modified with respect to the amount of spousal support awarded Wife as follows: Husband shall pay Wife \$1,200 per month alimony for a total of five (5) years. In months where Husband pays or has paid COBRA payments for Wife, the \$1,200 amount

will be reduced by the amount of the COBRA payment. In all other respects, the judgment of the trial court is affirmed. The parties are responsible for their own attorneys' fees on appeal. The cause is remanded for further proceedings consistent with this opinion. Costs of appeal are assessed equally between Sherrie Blackburn Wynns and William Edward Wynns, Jr.

ANDY D. BENNETT, JUDGE